IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 285 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MANSUKHBHAI VITHALBHAI SONI

Versus

STATE OF GUJARAT

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Appearance:
MR SP DAVE for Petitioner No. 1
MR KG SHETH, APP for Respondent No. 1
..... for Respondent No. 2

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CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 11/07/2002

ORAL JUDGEMENT (Per : MR.JUSTICE Y.B.BHATT)

1. In the present appeal, the appellant original accused challenges the judgment of conviction and sentence passed by the Addl. City Sessions Court, Ahmedabad, dated 27.12.2001 in Sessions Case No. 40/2001 whereby the Sessions Court convicted the appellant of the offences under Section 8(c) read with Section 18 of the Narcotic Drugs & Psychotropic Substances Act, for being found in conscious possession of 2kgs and 200 gms. of Opium on 20th December, 2000, and sentenced him to rigorous imprisonment for 10 years with fine of Rs. 50,000, and in default RI for one year.

2. In this context, we have heard learned counsel for the appellant, carefully perused the impugned judgment of conviction and sentence and have referred to such evidentiary material on record, to which our attention has been drawn.

3. Learned counsel for the appellant first sought to dispute and challenge the findings of fact recorded by the Sessions Court on the basis of the evidentiary material on record. However, he could not dispute nor substantiate his contentions as regards the discovery of the contraband Opium on the day and date, with which the accused was charged.

4. Learned counsel for the appellant, however, sought to urge a law point based on the principle enunciated by Section 50 of the NDPS Act. In this context, it was sought to be contended that where the duly authorised officer intends to conduct the search of a person, if the person so requires, he shall be taken to the nearest Magistrate or the nearest Gazetted Officer as specified in Section 42. In short it was contended that the appellant was not informed about his right to be searched by a Magistrate. However, what is required to be noted in the context of this legal proposition is that the suspect is required to be informed of his right, by virtue of Section 50, only where the factual situation contemplated by the section would apply. In other words, where the officer intends to conduct a search "of any person", such officer is obliged to inform the suspect of his right to be taken to the nearest Magistrate for the purpose of conducting the search. In this context, the Supreme Court has laid down the principle that where the search intended to be carried out or in fact carried out is in respect of a bag or other similar article carried by the suspect, this does not amount to "a search of the person", and consequently non-compliance with the requirements of Section 50 would not vitiate the conviction. This principle has been laid in the case of

KANHAIYA LAL vs. STATE OF M.P., reported in (2000) 10 SCC 380. Obviously, therefore, where the search is not in respect of a person or a search of the person, Section 50 has no application. Under the circumstances, the suspect i.e. to say the appellant in the present case has no right to be informed of the right conferred upon him by Section 50.

5. A further contention was sought to be raised in the context of Section 42 of the Act. In the context of this Section, it was sought to be urged that where the concerned officer intends to act on advance information as regards any narcotic drug, such information shall be recorded by the concerned officer in writing, and the same shall be forwarded to his immediate superior within 72 hours. However, what is required to be noted is that these are the provisions of Section 42 of the NDPS Act, which pertain to entry, search, seizure and arrest without warrant or authorisation. Even a plain reading of sub-sec.(1) and particularly clauses (a), (b) and (c) would indicate that the same pertains to a building, conveyance or place. The word "place" in this context is in contradistinction with the use of the same word in Section 43 of the Act. Section 43 contemplates not merely "place", but "public place". Thus, when the suspect is searched, or some container being carried by the suspect is searched in "public place", the same would be governed by Section 43 and not by Section 42. Obviously, the provision dealing with advance information being required to be reduced in writing and being forwarded to his superior officer is a provision contained only in Section 42 and has no application to Sec. 43. On the facts of the case therefore when the appellant was apprehended in a public place, and the narcotic opium was discovered in a cloth bag, it would be Section 43, which is attracted and not Section 42. This contention therefore must fail.

6. Learned counsel for the appellant also sought to contend that the sentence is unduly harsh. In this context, it is Section 18(c) which is relevant. This provision provides for a sentence of rigorous imprisonment which may extend to 10 years and with fine which may extend to 1 lac rupees. In the instant case, the Sessions Court has awarded rigorous imprisonment for 10 years, with fine of Rs. 50,000/. Thus, to be more specific, the imprisonment is for the maximum period permissible by law and the fine is only half of that which is permissible by law. We cannot possibly consider this punishment as being excessively harsh for the simple reason that the offence is in respect of a very grave

nature and it is precisely for that reason that the legislature has enacted the Narcotic Drugs & Psychotropic Substances Act, which by its very nature and effect, is perhaps described as being harsher than other statutes dealing with criminals. As aforesaid, since the punishment imposed is permissible in law, is also another reason to take a view that such a sentence cannot be considered harsh and excessive.

7. No other contention is raised.

8. In the premises aforesaid we find that there is no substance in the present Appeal and the same is therefore dismissed.

(Y.B. Bhatt, J.)

(J.R. Vora, J.)

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